

STATE OF MICHIGAN  
COURT OF APPEALS

---

THOMAS RISING,

Plaintiff-Appellee,

v

SANDRA RISING, by  
WALTER SAKOWSKI, as Guardian and  
Conservator for SANDRA RISING,

Defendant-Appellant.

---

UNPUBLISHED

August 2, 2011

No. 294258; 298502  
Wayne Circuit Court  
Family Division  
LC No. 07-722016-DM

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I agree with the majority's decision to affirm the property division and attorney fee awards, and to reverse the trial court's denial of spousal support. Specifically, I agree that we must remand to the trial court to equitably weigh the factors affecting the spousal support decision and to render an award based on the incomes and needs of the parties. I write separately to express respectful disagreement with one aspect of the majority's analysis.

In its written opinion, the trial court found Rising "fully able to work" based on her mental competence and her "frequent trips to the casino." The trial court noted that Rising made approximately 38 doctor visits between January 30, 2006 and March 7, 2008, and concluded that she "has been engaged in 'doctor-shopping' for years for purposes of establishing a physical disability, in order not to work." The trial court's opinion continued, "Furthermore, *and most importantly as far as this Court is concerned*, on January 29, 2008, the Defendant made a statement with regards to an apparent heroin addiction." (Emphasis added). After finding that Rising failed to provide "any conclusive evidence that she has been declared physically disabled by the State of Michigan," the trial court discounted evidence supporting Rising's mental or emotional disability by discrediting Dr. Kodali's opinion that Rising "is unable to work at this time or in the near future." According to the trial court, "depression is not a bar to finding employment," and Rising's "frequent trips to the casino during the course of these divorce proceedings are in contravention to a person who is not able to function at a job."

The majority finds no clear error in the trial court's determination that Rising possessed an ability to work. *Ante* at 4. According to the majority, "[t]he only evidence to support

Rising's position were the notes from Dr. Kodali," which the trial court could freely disbelieve. *Id.* The majority cites the testimony of Rising's daughter and husband as having "countered the doctor's assertions" by describing Rising's ability to perform a variety of household chores, purchase of a high-intensity workout DVD, and frequent, lengthy casino visits. *Id.* In reaching its decision, the majority correctly rejects that Rising's "doctor-shopping" bore any relevance to her ability to work, and notes that the trial court later rescinded its reference to "heroin." *Id.* at 5. But because "both parties possessed" the ability to work, the majority concludes that "this factor should have been deemed neutral" instead of favoring the plaintiff husband, as found by the trial court. *Id.* at 6.

I would hold that the trial court clearly erred by finding Rising capable of working, and that this factor weighed in her favor. In my view, Rising's mental or emotional illness and lack of current employment experience drastically limited her earning capacity. Rising has a GED and last worked in 2001 cleaning the meat department in a Kroger store. Her earnings statement for that year reflects wages totaling \$5700. No evidence supports that Rising presently qualifies for any job that requires a modicum of training, experience or skill. In contrast, Thomas Rising performs skilled mechanical work for the United States Coast Guard, earns approximately \$70,000 each year, receives generous benefits, and has supplemented his income by repairing boats for private customers.

In my view, the evidence conclusively established that Rising lacks the ability to earn a living. At the spousal support hearing, Thomas Rising conceded his suspicion that Rising was "bipolar." In answer to an interrogatory, Thomas Rising described the reasons for the marital breakdown as follows: "Have you ever been badgered? The best way to describe her is like a roller coaster, she's up and down. There are good periods and bad. She will say the same thing over and over. Suggests that she may be bipolar." Thomas Rising rendered a perceptive and accurate diagnosis as evidenced by later psychological evaluations. Dr. Kodali's February 2008 letter stated in relevant part,

Mrs. Sandra Rising was seen in my office initially on 11/28/07 and referred to me by her Primary care doctor, Dr. Zazain, for an evaluation for depression and treatment.

Since then Ms. Rising has seen me three times in my office for medication management. Her diagnosis is "Major Depression" and she is being treated with Zoloft 100 mg one in the morning and Desyrel 200 mg one at night.

She is currently experiencing a lot of stress due to her failed marriage and is going through a divorce. She is receiving therapy from her therapist and her prognosis is good depending on:

- The outcome of her divorce
- Medication compliance
- Continue to see her therapist
- Continue to attend her divorce support group

Ms. Rising is unable to work at this time or in the near future. In my opinion, she is competent to handle her personal affairs and make decisions for herself.<sup>[1]</sup>

The trial court's opinion references other medical records characterizing Rising as "severe bipolar."<sup>2</sup> In October 2009, one month after the trial court entered the divorce judgment, an independent medical examiner appointed by the probate court confirmed that Rising suffers from "Bipolar Disorder."

Thomas Rising submitted no evidence that Rising could maintain gainful employment other than offering his self-serving opinion, and that of his 18-year-old daughter.<sup>3</sup> The trial court inextricably intertwined condemnation of Rising's gambling habit and "apparent heroin addiction" with its determination that she possessed an ability to work, and reinforced this conclusion with a patently flawed finding that "depression is not a bar to finding employment." "A judge's role is to achieve equity, not to 'punish' one of the parties." *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993). That Rising bought a workout DVD, performed routine household chores, and engaged in self-destructive behavior typical of her disease hardly equates to an ability to maintain gainful employment. I am definitely and firmly convinced that the parties' vast vocational disparity, combined with Rising's indisputably serious psychological disorder, warranted scoring this factor in Rising's favor.

On remand, I would order the trial court to weigh the following additional factors in Rising's favor: "(3) the ability of the parties to work, . . . (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, . . . (10) the prior standard of living of the parties," *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008), and accordingly render an equitable spousal support award.

/s/ Elizabeth L. Gleicher

---

<sup>1</sup> The trial court opined that Dr. Kodali's prognostic reference to "the outcome of [the divorce]" undermined the credibility of his opinion. Read in context, Dr. Kodali cited several possible predictors of improvement. It hardly defies imagination that Rising harbored anxiety about "the outcome of her divorce," and that her apprehensions could impact her future emotional well-being.

<sup>2</sup> The other medical records are not contained in the trial court record.

<sup>3</sup> Rising's daughter contradicted her opinion regarding Rising's ability to work when she petitioned the probate court during the pendency of the divorce proceedings to appoint a conservator for her mother based on mental illness.